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ZACKS INVESTMENT RESEARCH, INC.,

13 an Illinois corporation

14
15 UNITED STATES DISTRICT COURT

16 SOUTHERN DISTRICT OF CALIFORNIA

17 JOHN KERR, individually and on
18 behalf of all others similarly situated,

19 Plaintiffs,

20 v.

21 ZACKS INVESTMENT RESEARCH,
INC., an Illinois corporation, and
22 DOES 1 through 50, inclusive,

23 Defendants.

Case No. **'16CV1352 GPC BLM**

[State Court Case No. 37-2016-
00015206-CU-MC-CTL]

**ZACKS INVESTMENT
RESEARCH, INC.'S NOTICE OF
REMOVAL OF ACTION
PURSUANT TO 28 U.S.C. §§ 1441(a)
& 1446**

[Filed concurrently with Declaration of
Lisa S. Yun and Notice of Parties with
Financial Interest]

Complaint Filed: May 6, 2016

1 **TO THE UNITED STATES DISTRICT COURT FOR THE**
2 **SOUTHERN DISTRICT OF CALIFORNIA AND TO PLAINTIFF AND HIS**
3 **ATTORNEYS OF RECORD:**

4 **PLEASE TAKE NOTICE** that Defendant Zacks Investment
5 Research, Inc. (“Zacks”), contemporaneously with the filing of this Notice, hereby
6 effects removal of the below-referenced action from the Superior Court of the State
7 of California, County of San Diego, to the United States District Court for the
8 Southern District of California.

9 This action is removed pursuant to the procedures found in 28 U.S.C.
10 section 1446, and removal jurisdiction is based on 28 U.S.C. section 1441(a)
11 (federal question) and section 1367(a) (supplemental jurisdiction).

12 **I.**

13 **STATE COURT COMPLAINT**

14 1. On May 6, 2016, Plaintiff John Kerr (“Plaintiff”) filed a
15 complaint in San Diego Superior Court entitled, *John Kerr v. Zacks Investment*
16 *Research, Inc., et al.* (“Complaint”).

17 2. Plaintiff served the Summons and Complaint on Zacks on May
18 19, 2016. Declaration of Lisa S. Yun, Ex. A.

19 3. Plaintiff asserts the following causes of action in his Complaint:
20 (1) alleged negligent violations of the Telephone Consumer Protection Act
21 (“TCPA”) under 47 U.S.C. § 227 *et seq.*; and (2) violation of California Penal Code
22 § 632.7. Yun Decl., Ex. A.

23 4. Plaintiff purports to act on behalf of two putative classes: the
24 “TCPA Class” and the “Privacy Act Class.”

25 5. The TCPA Class is defined as:

26 All natural persons nationwide who, during the applicable
27 limitations period, received a telephone call from
28 defendants that was (1) made to their cellular telephone
and (2) initiated by defendants using an artificial or
prerecorded voice and/or automatic telephone dialing

1 system. Excluded from the class are all employees of
2 defendants, all employees of defendants' counsel, and all
employees of plaintiff's counsel.

3 *See* Yun Decl., Ex. A., Complaint ¶ 16.

4 6. The Privacy Act Class is defined as:

5 All natural persons who, while residing and physically
6 present in the State of California, and during the
applicable statute of limitations: (1) participated in at least
7 one outbound telephone communication with a live
representative of defendants while on a cellular telephone
8 that was recorded by defendants; (2) were not notified by
defendants that the telephone communication was being
9 recorded; and (3) are identifiable through records held by
defendants and/or third parties. Excluded from the class
10 are all employees of defendants, all employees of
defendants' counsel, and all employees of plaintiff's
11 counsel.

12 *See* Yun Decl., Ex. A., Complaint ¶ 17.

13 7. Zacks answered Plaintiff's Complaint in the Superior Court on
14 June 2, 2016. Zacks's Answer generally denies Plaintiff's allegations pursuant to
15 California Code of Civil Procedure section 431.30(d), and asserts a number of
16 affirmative defenses. Yun Decl., Ex. B.

17 **II.**

18 **REMOVAL IS PROPER BASED ON FEDERAL QUESTION**

19 **JURISDICTION**

20 1. This Court has original federal question jurisdiction under 28
21 U.S.C. § 1331.

22 2. Plaintiff asserts a cause of action based on the Telephone
23 Consumer Protection Act, 47 U.S.C. § 227 *et seq.* Accordingly, the Complaint is
24 removable under federal question jurisdiction 28 U.S.C. § 1441(a).

25 3. Under 28 U.S.C. § 1367, this Court also has supplemental
26 jurisdiction over Plaintiff's claim under California Penal Code § 632.7 because this
27 claim arises out of the same operative facts as Plaintiff's claims under the TCPA and
28

1 “form part of the same case or controversy under Article III of the United States
2 Constitution.” 28 U.S.C. § 1367(a).

3 **III.**

4 **THIS NOTICE OF REMOVAL IS PROCEDURALLY PROPER**

5 1. In accordance with 28 U.S.C. § 1446(a), all copies of the papers
6 filed in the State Court action as of the filing of this Notice of Removal are attached
7 as exhibits to the Yun Declaration.

8 2. Pursuant to 28 U.S.C. § 1446(b)(2)(B), Zacks had 30 days from
9 May 19, 2016—the date of the service of the Complaint and Summons—to file its
10 Notice of Removal, i.e. until June 20, 2016. Thus, Zacks’s Notice of Removal is
11 timely.

12 3. Venue in this Court is proper pursuant to 28 U.S.C. § 1446(a)
13 because this action was removed from San Diego County Superior Court, located
14 within the District and Division of the Court.

15 4. Pursuant to 28 U.S.C. § 1446(d), Zacks is providing written
16 notice to Plaintiff of the removal of this action.

17 5. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of
18 Removal is being filed with the Clerk of the Superior Court of the State of
19 California, San Diego County.

20 6. Zacks is the only named Defendant in this action. Zacks is not
21 required to investigate the identity of the unnamed defendants or to obtain their
22 consent for removal. *See Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 690-91 (9th
23 Cir. 1998). In any event, no Doe defendant has been served. Zacks is not required
24 to obtain consent to remove from defendants who have not been served. *See* 28
25 U.S.C. § 1446(b).

1 IV.

2 **CONCLUSION**

3 For all of the reasons set forth above, Zacks removes the original action
4 brought by Plaintiff in the Superior Court of the State of California for the County
5 of San Diego to this Court.

6
7 Dated: June 3, 2016

8 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

9 By s/Lisa S. Yun

10 LISA S. YUN

11 Attorneys for Defendant
12 ZACKS INVESTMENT RESEARCH, INC.
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